

Erie Coke & Chemical Company and United Steelworkers of America, Petitioner. Case 8-RC-12322

April 8, 1982

DECISION AND ORDER DIRECTING HEARING

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on January 22, 1981,¹ and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings² and recommendations, except as modified herein.

The Regional Director recommended that the Employer's Objection 1 be overruled. The Employer excepts, contending that the Regional Director erred in applying the law, and that the Regional Director improperly resolved conflicts in testimony. We find merit in the exceptions, and accordingly we shall direct that a hearing be held on Objection 1 for the following reasons.

In *N.L.R.B. v. Claxton Manufacturing Company, Inc.*, 613 F.2d 1364 (5th Cir. 1980), the court held that due process requires that a hearing be conducted when the losing party files evidence that, *prima facie*, raises substantial and material issues that would warrant setting aside the election. In addition, the court held that when the objecting party had established a right to a hearing, the Regional Director's "investigation of the objections was not a substitute for it. The hearing may not be denied on the basis of new information obtained *ex parte* by the Regional Director." The court added that the Regional Director "must make available relevant information discovered in the course of his investigation, at least to the extent that [an objecting party] has pointed him toward it, whether it favors the successful party or the objector and regardless of whether it was referred to by the objector's affidavits or is independently turned up by the investigation."

Due in part to the opinion in *Claxton, supra*, and other similar court decisions like it, the Board reexamined its procedures for disposing of postelection

objections to the conduct of elections. On September 15, 1981, the Board amended its Rules and Regulations at 29 CFR Sections 102.68 and 102.69 pertaining to procedures applicable to disposition of objections to an election. Therein the Board acknowledged the criticism by the courts of the Board's failure to hold hearings on election objections in a situation when, in the opinions of the courts, the "substantial and material factual issues" standards of the Board's Rules and Regulations required it to do so. The revisions in the Board's Rules and Regulations make clear that *ex parte* investigations are not to be used to resolve "substantial and material factual issues" particularly where the factual issues turn on credibility. Rather the rules specifically provide that a hearing "shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues." Section 102.69(d).

In this proceeding, as noted *supra*, the Employer has supplied affidavits to the Regional Director which show that an employee was the victim of a threat on his life from someone who purported to be a representative of the International. The asserted threat came sometime after the victim expressed his support for the Employer to his fellow employees. Although the record suggests that only two unit employees, Miller and his son, may have known about the threat before the election, the Board has held that in the reality of industrial life a serious threat, though made to a single employee, will affect other employees in the selection of a union as it will be inevitably discussed by them.³ In this case, we find that the record contains inconsistent statements with respect to the circumstances surrounding the alleged threat. The resolution of these conflicts by the Regional Director was improper and requires that we remand this proceeding for further hearing.⁴ Accordingly, we shall remand this proceeding to the Regional Director for him to arrange a hearing on the Employer's Objection 1.

ORDER

It is hereby ordered that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the Employer's Objection 1.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 43 for, and 42 against, the Petitioner. There were no challenged ballots.

² In the absence of exceptions thereto, we adopt, *pro forma*, the Regional Director's recommendations to overrule Employer's Objections 2 and 3.

³ *General Stencils, Inc.*, 195 NLRB 1109 (1972).

⁴ See *Anchor Inns, Inc., d/b/a Anchor Inn Hotel of St. Croix*, 644 F.2d 292 (3d Cir. 1981); *Claxton Manufacturing, supra*.

parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objection. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the

Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 8 for the purpose of arranging such hearing, and that the said Regional Director be, and hereby is, authorized to issue notice thereof.